

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MIYOKO'S KITCHEN,

Plaintiff,

v.

KAREN ROSS, in her official capacity as
Secretary of the California Department of
Food and Agriculture, and STEPHEN
BEAM, in his official capacity as Branch
Chief of the Milk and Dairy Food Safety
Branch,

Defendants.

Case No. 3:20-cv-00893-RS

**Declaration of Michele Simon,
founder of the Plant Based Foods
Association**

I, Michele Simon, declare as follows:

1. I am the founder and former executive director of the Plant Based Foods Association (PBFA) from its inception in 2015 through 2020. PBFA is a trade association that represents the leading manufacturers and sellers of 100% plant-based foods. I, along with the five founding board members, established PBFA to build a strong foundation for the plant-based foods industry to succeed and thrive. A large part of that work involved giving innovative food companies a collective voice in the policy arena and marketplace. During my time as executive director, I routinely engaged with federal and state legislators and regulators; a key component to PBFA's work involves assisting state and federal agencies and lawmakers to understand the policies that affect the plant-based industry as a whole. Prior to serving as the PBFA executive director, I had extensive experience as a public health attorney, food policy expert, and author. I am currently Of Counsel with the food law firm Handel Food Law LLC.

2. PBFA currently has more than 300 company, affiliate, and investor members who represent the unified voice of the plant-based foods industry. Of PBFA's 190 company-members, approximately a third manufacture and sell plant-based dairy

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alternatives such as plant-based cheese, ice cream, butter, and yogurt. At least 15 of those companies sell products in California, including Miyoko's Kitchen.

3. I have personal knowledge of the facts set forth herein, except as those stated on information and belief. As to those, I am informed and believe them to be true. If called as a witness, I could and would competently testify to the matters stated herein. Neither I nor PBFA is being compensated by ALDF for providing consultation or for producing this declaration.

I. Summary of Testimony

1. Plant-based dairy naming conventions are widely employed by producers and thoroughly understood by consumers.

2. Consumers and companies view plant-based options as "revolutionizing" the existing marketplace.

3. PBFA has worked to counter state-level legislative efforts and enforcement of outdated laws that has been a direct result, and at the behest, of anti-competitive efforts by the animal-based dairy industry.

II. Testimony

A. Plant-based dairy naming conventions are widely employed by producers and thoroughly understood by consumers.

4. Plant-based dairy products like soymilk have existed for hundreds of years and have been on U.S. retail shelves for several decades. However, in the past several years, plant-based milks began taking up significant market share of the liquid milk market,¹ and other plant-based dairy products like plant-based cheeses and yogurts have grown exponentially.² Following this market growth, suddenly dairy lobbyists, state

¹ According to research from Mintel, non-dairy liquid milk sales have seen steady growth over the past five years, growing 61% since 2012. See <https://www.mintel.com/press-centre/food-and-drink/us-non-dairy-milk-sales-grow-61-over-the-last-five-years#:~:text=New%20research%20from%20Mintel%20reveals,reach%20%242.11%20billion%20in%202017.>

² PBFA website, Retail Sales Data 2018, <https://www.plantbasedfoods.org/marketplace/retail-sales-data-2018/> (last visited Mar. 8, 2021).

1 agencies, and federal agencies are concerned that consumers might mistake “coconut
2 milk” for cow’s ‘milk or vegan cashew cheese for cow’s cheese. The dairy industry’s
3 concerns notwithstanding, in the several decades that plant-based dairy products have
4 been regulated and sold, FDA has not taken any enforcement action against these
5 products for being misbranded (by being “false or misleading in any particular”³). The
6 FDA has also not taken any enforcement action against plant-based dairy products for
7 violating existing Standards of Identity for products like butter, milk, or cheese from
8 animals.

9
10 5. That said, once the dairy industry began pushing for FDA action against its
11 plant-based competitors (the National Milk Producers Federation, a dairy trade group,
12 sent dozens of letters to FDA and state agencies over the past twenty years or so), FDA
13 sought public comment on dairy terminology—to “modernize food standards of identity”
14 and to “provide flexibility for the development of healthier foods [and] . . . horizontal
15 changes that would better facilitate innovation.”

16 6. On January 27, 2019, I submitted comments on behalf of PBFA to FDA
17 regarding the Use of the Names of Dairy Foods in the Labeling of Plant-Based Products.
18 Then, as now, my experience has shown that companies selling dairy alternatives are
19 using easy to understand, clear, descriptive, and truthful language on labels. This
20 includes using common terminology that consumers understand like milk, cheese, yogurt,
21 and butter—along with qualifying language like “non-dairy,” “dairy-free,” “plant-based,”
22 and “vegan” to make the labels clear. At the same time, dairy terminology is crucial to
23 convey to consumers the functionality, texture, and flavor of these products.

24 7. Further, American consumers are well-informed about what plant-based
25 dairy products are made from and what terminology they expect to see on labels. They
26 understand words in context and are not confused by terms like “soy milk” and “vegan

27 ³ 21 U.S.C. 343(a).

1 butter.” In fact, naming plant-based dairy products without dairy terminology confuses
2 consumers and obfuscates the flavor, texture, and use of the products. A PBFA survey
3 confirmed this, and found that the vast majority of consumers of both cow’s milk and
4 plant-based milk (64 percent for dairy drinkers and 71 percent for plant-based drinkers)
5 agree that the term “milk” best identifies plant-based milk products. These consumers
6 further stated that it “does the best job of setting correct product expectations,” that “the
7 term milk has already been adopted” and that “it gives a clue as to how the product
8 should be used.”⁴

9
10 8. On September 27, 2019, I testified before FDA on behalf of PBFA members
11 during FDA’s public meeting on “Horizontal Approaches to Food Standards of Identity
12 Modernization.”⁵ In my remarks, I noted that although there is much discussion about the
13 use of dairy terminology like “milk” and “butter” to identify plant-based products, “for
14 our members, and as the data shows, for many consumers, the word simply describes the
15 functionality of the product.” The bottom line is that plant-based alternatives have clearly
16 and appropriately used dairy terms as part of their common or usual names for more than
17 30 years.

18 9. In response to FDA’s request for public comment, consumers and other
19 commenters resoundingly agreed: Consumers are not confused by plant-based dairy
20 products’ use of dairy terminology. Thanks to a survey of more than half (7,061) of the
21 11,903 publicly available comments to FDA on the issue,⁶ 76% of commenters are in favor
22 of allowing plant-based foods to use dairy terms like soy milk, plant-based cheese, and
23 vegan butter.

24 ⁴ PBFA survey, article available at PBFA website, <https://www.plantbasedfoods.org/plant-based-foods-association-tells-fda-that-efforts-to-restrict-milk-labeling-would-be-unnecessary-costly-and-unconstitutional/> (last
25 visited Mar. 8, 2021).

26 ⁵ <https://www.plantbasedfoods.org/pbfa-comments-for-fda-meeting/>

27 ⁶ Commissioned by PBFA and executed with the help of conducted by Linkage Research. See Linkage
28 Research, Consumers Support Use of Dairy Terms for Plant-Based Foods, <https://linkageresearch.com/fda-plant-based/> (last visited Mar. 8, 2021).

10. For PBFA, the survey of public comments to FDA came as no surprise—and aligned with advice PBFA offers its members. In 2017, PBFA convened a Standards Committee to establish voluntary standards for the labeling of plant-based milks, with further standards for other plant-based dairy products to follow. These standards are designed to provide plant-based dairy producers with guidance as to naming conventions that both comply with FDA law as well as convey the texture, flavor, and functionality of the products to consumers. Companies applying for PBFA’s Certified Plant Based stamp must adhere to these guidelines, and these guidelines provide that, to best communicate to consumers, companies should continue using dairy terminology accompanied by appropriate qualifying language like “non-dairy” or “plant-based.”

B. Consumers and companies view plant-based options as “revolutionizing” the existing marketplace.

11. Miyoko’s, similar to other PBFA members who produce plant-based dairy products, is seeking both to meet consumer demand for alternative dairy products, but also to address consumers’ concerns about the effect animal-based dairy has on personal health, animal welfare, and the environment. In many ways, providing plant-based products that look, taste, and behave like traditional product is serving to revolutionize the dairy industry. Miyoko’s and other PBFA members have the capacity to do just that—and without directly changing or reformulating animal-based dairy product by, for example, adding pea protein to cow milk.

12. There is a current and urgent need to “revolutionize” the dairy industry. Approximately 65% of the American population is lactose intolerant, and environmental sustainability ranks among the highest of consumer concerns when it comes to turning away from animal-based dairy products.⁷ There is an increasing consumer demand for products like cheese, butter, and milk made without the use of animal-derived

⁷ See, e.g., PBFA comments to FDA (Jan. 27, 2019), Re: Use of the Names of Dairy Foods in the Labeling of Plant-Based Products; Docket ID: FDA-2018-N-3522.

1 ingredients. Even though these products can still be made without the use of animal-
 2 derived ingredients, the best description for them, in terms of nature, contents, flavor, and
 3 functionality of these product—is still “dairy.”

4 13. As I mentioned above, consumers are sophisticated and already familiar
 5 with plant-based dairy products like vegan milk, butter, and cheese. Thus, it is my
 6 understanding that consumers are likely to interpret Miyoko’s mission statement,
 7 “Revolutionizing Dairy with Plants,” as acknowledging that the plant-based dairy
 8 products produced by Miyoko’s have the potential to change what products are
 9 considered to be dairy products.

10
 11 **C. PBFA has worked to counter state-level legislative efforts and**
 12 **enforcement of outdated laws that has been a direct result, and at the**
 13 **behest, of anti-competitive efforts by the animal-based dairy industry.**

14 14. As I stated in a prior declaration, for several years, concurrent with the
 15 growth of plant-based dairy products, members of PBFA have contacted me after
 16 receiving threatened enforcement by CDFA and other state agencies—almost always in
 17 states where the animal-based dairy industry holds a lot of political sway. In my
 18 experience, I feel comfortable concluding that these state-level enforcement efforts are a
 19 direct result of efforts from animal-based dairy lobbyists. The animal-based dairy
 20 industry would love nothing more than for plant-based dairy products to be prevented
 21 from using clear and non-misleading terms like “almondmilk yogurt,” “vegan cheese”
 22 and “soy milk,” because the ensuing consumer confusion would handicap plant-based
 23 producers and hinder the growth of plant-based dairy products like Miyoko’s.

24 **III. Conclusion**

25 **Declaration**

26 I declare under penalty of perjury that the foregoing is true and correct.
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Executed this _15th_day of March, 2021

/s/ Michele Simon
Michele Simon

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